

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

JAMES E. HERMANSON,

Petitioner,

v.

ISIDRO BACA,<sup>1</sup> et al.,

Respondents.

Case No. 3:17-cv-00721-HDM-CLB

**ORDER**

Petitioner James E. Hermanson has filed a habeas petition pursuant to 28 U.S.C. § 2254 challenging his state-court conviction, pursuant to a guilty plea, of sexual assault of a child under sixteen. (ECF No. 21). The second amended petition, filed by counsel, is before the Court for adjudication of the merits. Respondents have answered (ECF No. 53), and Hermanson has replied. (ECF No. 54).

For the reasons discussed below, the Court denies Hermanson's habeas petition, denies him a certificate of appealability, and directs the Clerk of the Court to enter judgment accordingly.

**I. BACKGROUND<sup>2</sup>**

On March 16, 2013, Hermanson was arrested after his minor

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<sup>1</sup> According to the state corrections department's inmate locator page, Hermanson is incarcerated at Northern Nevada Correctional Center. The department's website reflects that Fernandies Frazier is the warden of that facility. At the end of this order, the Court directs the Clerk of the Court to substitute Fernandies Frazier for Respondent Isidro Baca under Rule 25(d) of the Federal Rules of Civil Procedure.

<sup>2</sup> The Court makes no credibility findings or other factual findings regarding the truth or falsity of this summary of the evidence from the state court. This Court's summary is merely a backdrop to its consideration of the issues presented in the case. Any absence of mention of a specific piece of evidence does not signify that the Court overlooked it in considering Hermanson's claims.

1 stepdaughter, M.M., disclosed to law enforcement that he had  
2 engaged in "[i]nappropriate sexual conduct" with her. (ECF No. 15-  
3 1 at 104-06, 108-09). When officers arrived at his house to arrest  
4 him, Hermanson was unconscious. (*Id.* at 13). Feeling "severely  
5 depressed" about M.M.'s allegations, Hermanson had attempted to  
6 commit suicide by overdosing on "psych meds, pain pills, and  
7 Flexeril." (*Id.* at 12-13, 15, 32). The arresting officers woke him  
8 up and took him to a Yerington hospital, where he stayed before  
9 being transported by Care Flight to a hospital in Reno. (*Id.* at  
10 14).

11       Following his hospital stays, Hermanson was taken to the Lyon  
12 County Jail. (*Id.*) There, Hermanson tried to commit suicide again,  
13 first by banging his head against a wall and then by eating the  
14 "plastic on [his] mattress." (*Id.* at 15-16). Hermanson was taken  
15 to a hospital, where a doctor filled out a form "committing [him]  
16 to the mental hospital in Reno." (*Id.* at 16). Instead of taking  
17 him to the "mental hospital," however, the escorting officer took  
18 him back to the jail. (*Id.*)

19       On the evening of March 18, 2013, law enforcement interviewed  
20 Hermanson at the jail. (*Id.* at 109-12). Following the reading of  
21 his *Miranda* rights, Hermanson admitted that he had touched M.M.'s  
22 clitoris "one time" because "she asked [him] to." (*Id.* at 125-28).  
23 Hermanson acknowledged that this admission "was enough to put [him]  
24 in prison" for "lewdness." (*Id.* at 128).

25       Two days later, on March 20, 2013, Hermanson was charged with  
26 one count of lewdness with a child under fourteen, specifically  
27 M.M. (ECF No. 14-2). On May 1, 2013, Hermanson was charged with an  
28 additional count of sexual assault of a child under sixteen. (ECF

1 No. 14-3). This new charge related to allegations that Hermanson  
2 had engaged in sexual conduct with K.H., his niece. (*Id.* at 2; ECF  
3 No. 15-1 at 68). The amended criminal complaint, which contained  
4 both counts, noted that Hermanson had previously been convicted of  
5 lewdness with a child under fourteen. (ECF No. 14-3 at 1-2). As a  
6 result of this prior conviction, Hermanson faced a potential  
7 sentence of life without the possibility of parole. See NRS §  
8 200.366(4) (West 2013); NRS § 201.230(3) (West 2013).

9 On July 1, 2013, Hermanson pled guilty to one count of sexual  
10 assault of a child under sixteen. (ECF No. 14-7). In exchange, the  
11 State agreed to (i) drop the charge of lewdness with a child under  
12 fourteen, and (ii) not seek a sentence of life without the  
13 possibility of parole for the remaining count. (*Id.* at 1; ECF No.  
14 15-1 at 21-22). Instead, Hermanson would receive a sentence of  
15 life with the possibility of parole after twenty-five years. (ECF  
16 No. 14-7 at 2). Following the entry of his guilty plea, Hermanson  
17 was sentenced to life with parole eligibility after twenty-five  
18 years. (ECF No. 14-9).

19 Hermanson did not pursue a direct appeal. Instead, he sought  
20 habeas relief in Nevada state court. (ECF No. 14-10). Counsel was  
21 appointed, and Hermanson filed a supplemental petition on April  
22 15, 2015. (ECF No. 14-16). Following an evidentiary hearing, the  
23 state district court denied Hermanson's petition. (ECF No. 15-2).  
24 The Nevada Court of Appeals affirmed the denial of the petition on  
25 January 19, 2017. (ECF No. 16-7). While his appeal was pending,  
26 Hermanson filed another state habeas petition, which was  
27 subsequently denied as successive. (ECF No. 16-2; ECF No. 16-11).

28 This Court received Hermanson's *pro se* federal habeas

petition on December 14, 2017. (ECF No. 1). Following the appointment of counsel, Hermanson filed a first amended petition and then a second amended petition. (ECF Nos. 13, 21). Respondents moved to dismiss Grounds 2, 3, 4, and 5 of the second amended petition. (ECF No. 31). This Court held that Ground 3 was unexhausted, and that Grounds 2, 4, and 5 were technically exhausted but procedurally defaulted. (ECF No. 43). The Court allowed Hermanson to return to state court to exhaust Ground 3 and agreed to defer consideration of whether Hermanson could excuse the default of Grounds 2, 4, and 5 until the merits disposition. (*Id.* at 7; ECF No. 45).

This action was stayed while Hermanson exhausted Ground 3, which alleged that his right to due process was violated because he was sentenced without a presentence investigation report ("PSI"). (ECF No. 45). Hermanson returned to state district court and filed a motion to correct an illegal sentence. (ECF No. 51-2). The district court denied the motion, and the Nevada Supreme Court affirmed on October 18, 2021. (ECF No. 51-2; ECF No. 51-7). Following the completion of the state-court proceedings, the Court reopened this action and ordered merits briefing on the second amended petition. (ECF No. 52).

## **II. LEGAL STANDARDS**

### **A. Review under the Antiterrorism and Effective Death Penalty Act**

The Antiterrorism and Effective Death Penalty Act ("AEDPA") sets forth the standard of review generally applicable in habeas corpus cases:

An application for a writ of habeas corpus on behalf of

1 a person in custody pursuant to the judgment of a State  
2 court shall not be granted with respect to any claim  
that was adjudicated on the merits in State court  
proceedings unless the adjudication of the claim -

- 3 (1) resulted in a decision that was contrary to, or  
4 involved an unreasonable application of, clearly  
established Federal law, as determined by the  
Supreme Court of the United States; or
- 5 (2) resulted in a decision that was based on an  
6 unreasonable determination of the facts in light of  
the evidence presented in the State court  
7 proceeding.

28 U.S.C. § 2254(d). A state-court decision is contrary to  
8 established Supreme Court precedent, within the meaning of §  
9 2254(d)(1), "if the state court applies a rule that contradicts  
10 the governing law set forth in [Supreme Court] cases" or "if the  
11 state court confronts a set of facts that are materially  
12 indistinguishable from a decision of [the Supreme] Court." *Lockyer*  
13 *v. Andrade*, 538 U.S. 63, 73 (2003) (quoting *Williams v. Taylor*,  
14 529 U.S. 362, 405-06 (2000), and citing *Bell v. Cone*, 535 U.S.  
15 685, 694 (2002)). A state-court decision is an unreasonable  
16 application of established Supreme Court precedent under §  
17 2254(d)(1) "if the state court identifies the correct governing  
18 legal principle from [the Supreme] Court's decisions but  
19 unreasonably applies that principle to the facts of the prisoner's  
20 case." *Id.* at 75 (quoting *Williams*, 529 U.S. at 413). "The  
21 'unreasonable application' clause requires the state court  
22 decision to be more than incorrect or erroneous. The state court's  
23 application of clearly established law must be objectively  
24 unreasonable." *Id.* (internal citation omitted) (quoting *Williams*,  
25 529 U.S. at 409-10).

26 "A state court's determination that a claim lacks merit  
27 precludes federal habeas relief so long as 'fairminded jurists  
28

1 could disagree' on the correctness of the state court's decision."  
2 *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (quoting *Yarborough*  
3 *v. Alvarado*, 541 U.S. 652, 664 (2004)). And "even a strong case  
4 for relief does not mean the state court's contrary conclusion was  
5 unreasonable." *Id.* at 102 (citing *Lockyer*, 538 U.S. at 75); see  
6 also *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (describing  
7 the standard as "difficult to meet" and a "highly deferential  
8 standard for evaluating state-court rulings, which demands that  
9 state-court decisions be given the benefit of the doubt" (internal  
10 quotation marks and citations omitted)).

11 **B. Standard for Evaluating an Ineffective-Assistance Claim**

12 In *Strickland*, the Supreme Court propounded a two-prong test  
13 for analysis of claims of ineffective assistance of counsel  
14 requiring a petitioner to demonstrate that (i) the attorney's  
15 "representation fell below an objective standard of  
16 reasonableness," and (ii) the attorney's deficient performance  
17 prejudiced the petitioner such that "there is a reasonable  
18 probability that, but for counsel's unprofessional errors, the  
19 result of the proceeding would have been different." *Strickland v.*  
20 *Washington*, 466 U.S. 668, 688, 694 (1984). Courts considering a  
21 claim of ineffective assistance of counsel must apply a "strong  
22 presumption that counsel's conduct falls within the wide range of  
23 reasonable professional assistance." *Id.* at 689. The petitioner  
24 bears the burden of showing that "counsel made errors so serious  
25 that counsel was not functioning as the 'counsel' guaranteed . .  
26 . by the Sixth Amendment." *Id.* at 687.

27 Moreover, to establish prejudice under *Strickland*, it is not  
28 enough for the petitioner "to show that the errors had some

1 conceivable effect on the outcome of the proceeding." *Id.* at 693.  
2 Rather, the errors must be "so serious as to deprive the  
3 [petitioner] of a fair trial, a trial whose result is reliable."  
4 *Id.* at 687. When the ineffective-assistance claim challenges a  
5 guilty plea, the *Strickland* prejudice prong requires the  
6 petitioner to demonstrate "a reasonable probability that, but for  
7 counsel's errors, [the petitioner] would not have pleaded guilty  
8 and would have insisted on going to trial." *Hill v. Lockhart*, 474  
9 U.S. 52, 59 (1985).

10 Under *Hill*, a challenge to the voluntariness of a plea may be  
11 based upon a claim of ineffective assistance of counsel. As the  
12 Supreme Court observed:

13 For example, where the alleged error of counsel is a  
14 failure to investigate or discover potentially  
15 exculpatory evidence, the determination whether the  
16 error "prejudiced" [the petitioner] by causing him to  
17 plead guilty rather than go to trial will depend on the  
18 likelihood that discovery of the evidence would have led  
19 counsel to change his recommendation as to the plea.  
20 This assessment, in turn, will depend in large part on  
21 a prediction whether the evidence likely would have  
22 changed the outcome of a trial. Similarly, where the  
23 alleged error of counsel is a failure to advise [the  
24 petitioner] of a potential affirmative defense to the  
25 crime charged, the resolution of the "prejudice" inquiry  
26 will depend largely on whether the affirmative defense  
27 likely would have succeeded at trial. . . . As we  
28 explained in *Strickland v. Washington*, these predictions  
of the outcome at a possible trial, where necessary,  
should be made objectively, without regard for the  
"idiosyncrasies of the particular decisionmaker."

*Id.* at 59-60 (citing *Strickland*, 466 U.S. at 695).

Where a state court previously adjudicated the claim of  
ineffective assistance of counsel under *Strickland*, establishing  
that the decision was unreasonable is especially difficult. See  
*Harrington*, 562 U.S. at 104-05. In *Harrington*, the Supreme Court  
clarified that *Strickland* and § 2254(d) are each highly

1 deferential, and when the two apply in tandem, review is doubly  
2 so. See *id.* at 105; see also *Cheney v. Washington*, 614 F.3d 987,  
3 995 (9th Cir. 2010) (internal quotation marks omitted) (“When a  
4 federal court reviews a state court’s *Strickland* determination  
5 under AEDPA, both AEDPA and *Strickland*’s deferential standards  
6 apply; hence, the Supreme Court’s description of the standard as  
7 doubly deferential.”). The Court further clarified that, “[w]hen  
8 § 2254(d) applies, the question is not whether counsel’s actions  
9 were reasonable. The question is whether there is any reasonable  
10 argument that counsel satisfied *Strickland*’s deferential  
11 standard.” *Harrington*, 562 U.S. at 105.

### 12 **III. ANALYSIS**

#### 13 **A. Ground 1(B)<sup>3</sup>**

14 In Ground 1(B), Hermanson alleges that his counsel provided  
15 ineffective assistance by failing to move to suppress the  
16 statements he made to law enforcement after his arrest. (ECF No.  
17 21 at 13). Hermanson points to several “red flags” that allegedly  
18 “rais[e] concerns [about] the voluntariness” of his statements.  
19 (*Id.*) The “red flags” include (i) Hermanson’s “severe mental health  
20 breakdown,” which culminated in multiple suicide attempts before  
21 and after the interview; (ii) Hermanson’s lack of “adequate sleep”  
22 and his inability to “keep food down” around the time of the  
23 interview; and (iii) the “bias[ ]” of the interviewer, Detective  
24 McNeil, whose daughter had allegedly received a tattoo from  
25 Hermanson several years earlier. (ECF No. 54 at 11-14). Hermanson  
26 argues that, had his counsel moved to suppress his statements,

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27  
28 <sup>3</sup> The Court addresses Ground 1(B) before Ground 1(A) because the former claim provides background information relevant to the latter.



1 there is "more than a reasonability probability" that the motion  
2 would have been granted. (ECF No. 21 at 14). And, if the statements  
3 had been suppressed, Hermanson claims he "most certainly would  
4 have gone to trial." (*Id.*)

5 **1. Background Information**

6 Detective McNeil interviewed Hermanson at the Lyon County  
7 Jail on the evening of March 18, 2013. (ECF No. 15-1 at 109-12).  
8 At the state postconviction evidentiary hearing, McNeil testified  
9 that Hermanson was wearing a "suicide gown" during the interview  
10 because he had recently tried to kill himself. (*Id.* at 119).  
11 Nevertheless, according to McNeil, Hermanson "understood what  
12 [McNeil] was saying" and "asking." (*Id.*) McNeil began the interview  
13 by advising Hermanson of his *Miranda* rights. (*Id.* at 116-17).  
14 Hermanson agreed to answer McNeil's questions. (*Id.*) The two then  
15 discussed Hermanson's first suicide attempt and his current state  
16 of mind:

17 DETECTIVE MCNEIL: And you're in a suicide gown because  
of what happened when we -- when you were found?

18 HERMANSON: Uh-hum.

19 DETECTIVE MCNEIL: You know, I guess they took you, Care  
Flighted you from Reno to South Lyon.

20 HERMANSON: Reno.

21 DETECTIVE MCNEIL: No. They took you to Reno to make sure  
you're okay. Are you feeling okay right now?

22 HERMANSON: I'm as good as can be, I guess.

23 DETECTIVE MCNEIL: I mean, you're still not messed up  
from --

24 HERMANSON: No.

25 DETECTIVE MCNEIL: -- the pills you overdosed on or  
anything like that?

26 HERMANSON: No. I'm hurting because always my back, they  
won't give me my pain meds.

27 DETECTIVE MCNEIL: Okay. That's -- what I'm asking is you  
28 said -- you're coherent --

HERMANSON: Yes.

DETECTIVE MCNEIL: -- and you understand everything I'm saying?

HERMANSON: Yeah.

DETECTIVE MCNEIL: And you -- and there is no side affects [sic] for the medication or anything like that right now, other than the fact you'd like to get some of your pain medication -- pain meds?

HERMANSON: Exactly.

DETECTIVE MCNEIL: That's a jail issue.

HERMANSON: Yes. And that's fine.

DETECTIVE MCNEIL: All right.

(*Id.* at 119-20).

McNeil proceeded to question Hermanson about the allegations concerning M.M.:

DETECTIVE MCNEIL: I'm going to ask you very simply one question: Did you touch [M.M.'s] private area?

HERMANSON: Okay.

DETECTIVE MCNEIL: Do you understand what private area is?

HERMANSON: Uh-hum.

DETECTIVE MCNEIL: What private area?

HERMANSON: Her vagina.

DETECTIVE MCNEIL: Okay. Her vagina. Did you touch it?

HERMANSON: Yes, I did, one time. Because she asked me to.

DETECTIVE MCNEIL: Tell me about that.

HERMANSON: The only time I ever did because she asked me where the ball that [K.H.] told her about was. And I said it's right there. That was all I ever did. That's all I ever touched. I never did anything else.

(*Id.* at 125).

Hermanson elaborated on the incident, claiming that in the summer of 2012, M.M. had been discussing masturbation with him, and that she had pulled her pants down and asked him to "show [him] where the ball is that everybody's talking about." (*Id.* at 126). At that point, Hermanson said, he "reached down and touched it

1 like that. And I said, 'It's right there, that's where it is.' And  
2 I said, 'That's enough.' I walked away." (*Id.*) Hermanson  
3 subsequently clarified that by "ball," he was referring to the  
4 clitoris. (*Id.* at 126-27). He also acknowledged that his admission  
5 "was enough to put [him] in prison" for "lewdness." (*Id.* at 128).

## 6           **2. State-Court Determination**

7           In affirming the denial of Hermanson's state habeas petition,  
8 the Nevada Court of Appeals held:

9           First, Hermanson argued his counsel was ineffective  
10 for failing to file a motion to suppress the inculpatory  
11 statements he made to a sheriff's deputy. Hermanson  
12 alleged his statements were not voluntarily made because  
13 he had recently attempted suicide, overdosed on  
14 medication, used illegal drugs, did not receive adequate  
15 sleep, and suffered from further mental health and  
16 physical issues. Hermanson failed to demonstrate his  
17 counsel's performance was deficient or resulting  
18 prejudice.

14           "A confession is admissible only if it is made  
15 freely and voluntarily" and "must be the product of a  
16 rational intellect and a free will." *Passama v. State*,  
17 103 Nev. 212, 213-14, 735 P.2d 321, 322 (1987) (internal  
18 quotation marks omitted). When reviewing whether a  
19 confession was made voluntarily, "[v]oluntariness must  
20 be determined by reviewing the totality of the  
21 circumstances." *Gonzales v. State*, 131 Nev. \_\_, \_\_, 354  
22 P.3d 654, 658 (Nev. App. 2015).

19           The district court conducted an evidentiary hearing  
20 and Hermanson's counsel testified. Counsel testified he  
21 had reviewed Hermanson's statement and did not consider  
22 filing a motion to suppress because it was clear to him  
23 Hermanson did not have any difficulty understanding the  
24 discussion with the deputy. A review of the record  
25 reveals Hermanson's counsel's performance did not fall  
26 below an objective standard of reasonableness in this  
27 regard. *See id.*; *see also Ford v. State*, 105 Nev. 850,  
28 853, 784 P.2d 951, 953 (1989) (tactical decisions of  
counsel "are virtually unchallengeable absent  
extraordinary circumstances."). The district court  
further concluded Hermanson's testimony, in which he  
asserted he did not comprehend the deputy's questions,  
to be incredible, particularly in light of Hermanson's  
detailed description during the interrogation of his  
interactions with the victim. The district court's  
conclusions in this regard are supported by substantial  
evidence.

Further, the circumstances surrounding Hermanson's statement demonstrate it was voluntarily given. During the interrogation, the sheriff's deputy advised Hermanson of his *Miranda* rights and Hermanson agreed to talk with the deputy. The deputy questioned Hermanson to ensure he understood the conversation, and Hermanson responded that he felt fine, he had no side effects from any medication, and his only issue stemmed from back pain due to a lack of pain medication while housed in the county jail. Hermanson then explained to the deputy that he had touched the victim's vagina in response to the victim's anatomy questions. Hermanson acknowledged his actions were sufficient for the authorities to detain him. Under these circumstances, Hermanson failed to demonstrate a reasonable probability he would have refused to plead guilty and would have proceeded to trial had counsel filed a motion to suppress his statements. Therefore the district court did not err in denying this claim.

(ECF No. 16-7 at 2-3).

### 3. Conclusion

The Nevada Court of Appeals' rejection of this claim was a reasonable application of clearly established federal law and was not based on an unreasonable application of the facts. Where, as here, an ineffective-assistance claim rests on counsel's failure to file a motion to suppress evidence on constitutional grounds, a petitioner must establish that (i) such a motion had merit and (ii) there was a reasonable probability that, but for counsel's failure to file the meritorious motion to suppress, the petitioner "would not have pleaded guilty and would have insisted on going to trial." *Premo v. Moore*, 562 U.S. 115, 131-32 (2011); *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986). The Nevada Court of Appeals reasonably concluded that (i) the circumstances surrounding Hermanson's statements show that they were voluntarily given, and (ii) Hermanson's counsel was therefore not ineffective for failing to move to suppress the statements.

The admission into evidence at trial of an involuntary

1 confession violates a defendant's right to due process under the  
2 Fourteenth Amendment. *Lego v. Twomey*, 404 U.S. 477, 478 (1972);  
3 *Jackson v. Denno*, 378 U.S. 368, 376 (1964) ("It is now axiomatic  
4 that a defendant in a criminal case is deprived of due process of  
5 law if his conviction is founded, in whole or in part, upon an  
6 involuntary confession"); see also *Dickerson v. United States*, 530  
7 U.S. 428, 444 (2000) (explaining that the requirement that *Miranda*  
8 rights be given prior to a custodial interrogation does not  
9 dispense with a due process inquiry into the voluntariness of a  
10 confession). A confession is voluntary only if it is the product  
11 of rational intellect and free will. *Blackburn v. State of Alabama*,  
12 361 U.S. 199, 208 (1960). "[C]oercive police activity is a  
13 necessary predicate to the finding that a confession is not  
14 voluntary within the meaning of the Due Process Clause of the  
15 Fourteenth Amendment." *Colorado v. Connelly*, 479 U.S. 157, 167  
16 (1986) (internal quotation marks omitted).

17 Whether a confession is involuntary must be analyzed within  
18 the "totality of [the] circumstances." *Withrow v. Williams*, 507  
19 U.S. 680, 693 (1993). Factors to be considered include the degree  
20 of police coercion; the length, location, and continuity of the  
21 interrogation; and the defendant's maturity, education, physical  
22 condition, mental health, and age. *Id.* at 693-94. "This is a fact-  
23 based analysis that inherently allows for a wide range of  
24 reasonable application, and because the general standard requires  
25 a case-by-case analysis, federal courts must provide even more  
26 leeway under AEDPA in evaluating whether a rule application was  
27 unreasonable." *Reno v. Davis*, 46 F.4th 821, 836 (9th Cir. 2022)  
28 (internal quotation marks and citation omitted).

1       Hermanson contends that his statements were involuntary  
2 because, at the time of the interview, he was sleep-deprived, had  
3 not eaten much recently, and was undergoing a "severe mental health  
4 breakdown." (ECF No. 54 at 11-14). During the interview, however,  
5 Hermanson stated that he was no longer "messed up" from the pills  
6 he had overdosed on during his first suicide attempt. (ECF No. 15-  
7 1 at 119-20). Hermanson also made clear that he was "coherent" and  
8 understood "everything [McNeil] was saying." (*Id.*) Indeed, the  
9 only medical issue Hermanson identified was his back pain,  
10 complaining that the jail would not "give [him] [his] pain meds."  
11 (*Id.*) Moreover, Hermanson gave a detailed, coherent account of the  
12 incident with M.M., claiming that he had touched her clitoris  
13 during the summer of 2012 in response to her anatomy questions.  
14 (*Id.* at 125-27). And while Hermanson contends that Detective McNeil  
15 was "biased" because he had given McNeil's daughter a tattoo  
16 several years earlier, he points to no evidence that this fact  
17 influenced McNeil's handling of the interview. (ECF No. 54 at 11-  
18 12).

19       Considering the circumstances surrounding the interview, the  
20 Nevada Court of Appeals concluded that Hermanson's statements were  
21 voluntarily given. This ruling was not "so lacking in justification  
22 that there was an error well understood and comprehended in  
23 existing law beyond any possibility for fairminded disagreement."  
24 *Richter*, 562 U.S. at 786-87. And, having found that Hermanson's  
25 statements were voluntary, the Nevada Court of Appeals reasonably  
26 concluded that his counsel was not ineffective for failing to move  
27 to suppress those statements. Thus, Hermanson is not entitled to  
28 relief on Ground 1(B).

1           **B.     Ground 1(A)**

2           In Ground 1(A), Hermanson contends that his counsel was  
3 ineffective for failing to conduct an adequate investigation. (ECF  
4 No. 21 at 10). Hermanson claims that he “provided counsel with the  
5 names of numerous people who could have provided exculpatory  
6 information on [his] behalf.” (*Id.*) But, instead of listening to  
7 these witnesses when they visited him, counsel “simply play[ed]  
8 them Hermanson’s alleged statement incriminating himself.” (*Id.*)  
9 According to Hermanson, had his counsel performed “this basic  
10 investigation” and uncovered the allegedly exculpatory  
11 information, he would have gone to trial rather than pleading  
12 guilty. (*Id.* at 11).

13           **1.     Background Information**

14           At the state postconviction evidentiary hearing, several  
15 witnesses described the exculpatory information that Hermanson’s  
16 counsel allegedly ignored. Cecilia Gilland, a friend of Hermanson,  
17 testified that, approximately one month before K.H. accused  
18 Hermanson of sexual misconduct, K.H. had said that “she knew that  
19 [Hermanson] would never hurt her. That she was strong. And he had  
20 never hurt her, and that he never could.” (ECF No. 15-1 at 60-61).  
21 William Gilland, Cecilia’s husband, testified that approximately  
22 one month after Hermanson’s arrest on allegations of molesting  
23 M.M., K.H. had said “there is no way that [Hermanson] would ever  
24 touch me or ever could touch me.” (*Id.* at 70-72). T.H., Hermanson’s  
25 son, testified that M.M.’s mother (Jody Martin) “would have [him  
26 and] M.M. have sex in front of Jody’s party friends.” (*Id.* at 99).

27           Hermanson’s counsel stated at the evidentiary hearing that he  
28 had spoken to Cecilia Gilland, Jody Martin, and several other

1 witnesses, but that he did not find the information they provided  
2 to be "very helpful in this case." (*Id.* at 182-84). He also  
3 testified that the only written statement he received was from  
4 Raymond McClory, who claimed that "didn't see Mr. Hermanson ever  
5 do anything with the kids" and "didn't believe they were ever left  
6 alone with him." (*Id.* at 171). Hermanson's counsel discounted this  
7 statement because "everybody else"—including Jody Martin—said that  
8 "at times" Hermanson was "left alone" with the victims. (*Id.*)

9 Hermanson's counsel acknowledged that Cecilia Gilland had  
10 mentioned her conversation with K.H. (*Id.* at 183-84). He explained,  
11 however, that by the time Gilland came to him with this  
12 information, Hermanson had already told him he wanted to plead  
13 guilty. (*Id.* at 184). Counsel testified that, because of his prior  
14 conviction for lewdness with a minor, Hermanson "was looking at  
15 life without [the possibility of parole]," and that "to limit his  
16 liability," he chose to take a plea deal that included a sentence  
17 of life with parole eligibility after twenty-five years. (*Id.*)  
18 Counsel also stated that he had talked with Hermanson about the  
19 latter's statements to law enforcement, telling him that the  
20 confession "presented huge problems" because M.M. was "a 12-year-  
21 old girl and he's an adult," and a jury "may not be very forgiving  
22 in these kinds of cases." (*Id.* at 166). At the time of his guilty  
23 plea, Hermanson was forty years old. (ECF No. 17-1 at 1).

## 24 **2. State-Court Determination**

25 In affirming the denial of Hermanson's state habeas petition,  
26 the Nevada Court of Appeals held:

27 Second, Hermanson argued his counsel was  
28 ineffective for failing to investigate and interview  
witnesses. Hermanson alleged he provided names of



1 witnesses he believed would aid his case, but his counsel  
2 refused to take statements from those witnesses.  
3 Hermanson failed to demonstrate his counsel's  
4 performance was deficient or resulting prejudice. At the  
5 evidentiary hearing, counsel stated he had discussed the  
6 case with witnesses Hermanson had believed would provide  
7 favorable evidence, but those persons had not actually  
8 provided anything helpful to the defense. The district  
9 court concluded counsel's testimony was credible and  
10 substantial evidence supports that conclusion.

11 Hermanson also presented the testimony of many of  
12 these witnesses at the evidentiary hearing, but the  
13 district court concluded that none of those witnesses  
14 provided testimony that was exculpatory in nature.  
15 Substantial evidence supports the district court's  
16 conclusion in this regard. In addition, the record  
17 reveals Hermanson admitted to touching a victim's  
18 genitals and, had Hermanson rejected the State's plea  
19 offer and proceeded to trial, he would have faced a  
20 sentence of life without the possibility of parole as he  
21 had previously been convicted of a sexual offense  
22 against a child. [FN 3]. See NRS 200.366(4). Under these  
23 circumstances, Hermanson did not demonstrate a  
24 reasonable probability he would have refused to plead  
25 guilty and would have proceeded to trial had counsel  
26 conducted further investigation or interviews of  
27 witnesses. Therefore, the district court did not err in  
28 denying this claim.

[FN 3] We note Hermanson was originally charged  
with lewdness with a child under the age of 14 and  
sexual assault of a child under the age of 16.

(ECF No. 16-7 at 3-4).

### 3. Conclusion

19 The Nevada Court of Appeals' rejection of this claim was a  
20 reasonable application of clearly established federal law and was  
21 not based on an unreasonable application of the facts. To establish  
22 the prejudice prong of his ineffective-assistance claim, Hermanson  
23 "must convince the court that a decision to reject the plea bargain  
24 would have been rational under the circumstances." *Padilla v.*  
25 *Kentucky*, 559 U.S. 356, 372 (2010). "This assessment, in turn,  
26 will depend in large part on a prediction whether the [allegedly  
27 exculpatory] evidence likely would have changed the outcome of a  
28 trial." *Hill*, 474 U.S. at 59. The prejudice assessment is an

1 objective one made "without regard for the idiosyncrasies of the  
2 particular decisionmaker." *Id.* at 59-60 (internal quotation marks  
3 and citation omitted).

4 As the Nevada Court of Appeals explained, Hermanson was  
5 originally charged with one count of lewdness with a child under  
6 fourteen (M.M.), and an additional count of sexual assault of a  
7 child under sixteen (K.H.). (ECF No. 14-2; ECF No. 14-3). Because  
8 of his prior conviction for lewdness with a minor, Hermanson faced  
9 a potential sentence of life without the possibility of parole if  
10 convicted of either count. See NRS § 200.366(4) (West 2013); NRS  
11 § 201.230(3) (West 2013). The risk of conviction on at least one  
12 count was high, because Hermanson admitted to law enforcement that  
13 he had touched M.M.'s genitalia. (ECF No. 15-1 at 125-27). Thus,  
14 to avoid a sentence of life without the possibility of parole,  
15 Hermanson accepted a plea deal that included a sentence of life  
16 with eligibility for parole after twenty-five years. (*Id.* at 184).

17 Faced with this evidence, the Nevada Court of Appeals  
18 reasonably concluded that there was no "reasonable probability  
19 [Hermanson] would have refused to plead guilty and would have  
20 proceeded to trial had counsel conducted further investigation or  
21 interviews of witnesses." (ECF No. 16-7 at 4). Indeed, even if  
22 counsel had conducted a more thorough investigation, Hermanson  
23 still would have faced a significant risk of conviction for  
24 lewdness with a child under fourteen based on his admissions to  
25 law enforcement. And, as explained above, a conviction on that  
26 count could have carried a sentence of life without the possibility  
27 of parole. The plea deal thus offered Hermanson a substantial  
28 benefit: the possibility of parole after twenty-five years, when

1 he would be in his mid-sixties. In these circumstances, a  
2 fairminded jurist could conclude that Hermanson failed to show  
3 that "a decision to reject the plea bargain would have been  
4 rational under the circumstances." *Padilla*, 559 U.S. at 372; see  
5 also *Mulder v. Schomig*, 384 F. App'x 666, 667 (9th Cir. 2010)  
6 ("Mulder has not shown prejudice from the alleged errors on the  
7 part of counsel because there is no reasonable probability that he  
8 would have elected to stand trial and risk consecutive life  
9 sentences without the possibility of parole where there was very  
10 little chance that a trial would have resulted in a better sentence  
11 than the one he received by pleading.").

12 Against this, Hermanson contends that his "statement to the  
13 police would not have led [him] to avoid a trial" because it  
14 "clearly was not voluntary" and he "had strong arguments to  
15 convince the jury to reject the statement." (ECF No. 54 at 10).  
16 But, as explained above, the circumstances surrounding Hermanson's  
17 statements provide no basis to conclude that they were involuntary.  
18 For all of these reasons, Hermanson is not entitled to relief on  
19 Ground 1(A).

### 20 C. Ground 3<sup>4</sup>

21 In Ground 3, Hermanson alleges that his right to due process  
22 was violated because "the court did not have the legal authority  
23 to impose sentence" in the absence of a PSI. (ECF No. 21 at 20-  
24 21). At the sentencing hearing, Hermanson's counsel asked the court  
25 to "waive the PSI requirement," explaining that a PSI "would not  
26 benefit the sentencing hearing or the [c]ourt" because there was

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27  
28 <sup>4</sup> The Court addresses Ground 3 before Ground 2 because the facts relevant to  
the former claim provide background for the latter.

1 "only one sentence that can be given in this case"—life with the  
2 possibility of parole after twenty-five years. (ECF No. 14-8 at 6-  
3 7). The court then canvassed Hermanson about the waiver:

4 THE COURT: You understand by statute you have a right to  
5 a preliminary sentence investigation report to be done  
6 before the Court sentences you?

7 A Yes, sir.

8 THE COURT: All right. I'm just wondering, because we've  
9 been getting all of these cases coming down on the PSIs  
10 and the corrections and so forth, the prison will not  
11 take him without a PSI, right?

12 PROBATION OFFICER: Your Honor, I think they will take  
13 him.

14 THE COURT: As long as it's waived on the record?

15 PROBATION OFFICER: Yeah. Because the mandatory  
16 psychosexual evaluation will be done at the prison  
17 anyway, because it's an A.

18 THE COURT: So, Mr. Hermanson, you understand if you want,  
19 I will give you the opportunity to have that Presentence  
20 Investigation Report?

21 A Yes, sir, I do understand that.

22 Q And you've discussed the Presentence Investigation  
23 Report and its role in your sentencing with your  
24 attorney?

25 A Yes, sir.

26 Q All right. And do you have any questions about what  
27 the PSI does, or what the Presentence Investigation  
28 Report is used for?

A No, sir, I do not.

Q All right. Do you believe it's in your best interest  
at this point in time to waive your right to a  
Presentence Investigation Report and proceed to  
sentencing today?

A Yes, sir, I do.

Q All right. And is anyone threatening you to have  
you do that today?

A No, sir.

Q Has anyone promised you anything if you were to do  
that today?

A No, sir.

Q Okay. Do you wish any further time to think about  
this?

A No, sir.

1 THE COURT: So the Court will find that the defendant is  
2 freely, voluntarily, and intelligently waiving his right  
3 to a Presentence Investigation Report, and asking the  
4 Court to sentence him today. We'll put that on the  
5 record.

6 (*Id.* at 14-16).

7 Following this colloquy, the court pronounced Hermanson  
8 guilty of sexual assault of a child under sixteen and sentenced  
9 him to "life in the Nevada State Prison with the possibility of  
10 parole at 25." (*Id.* at 16-17).

11 In affirming the denial of Hermanson's motion to correct an  
12 illegal sentence, the Nevada Supreme Court held:

13 Appellant argues that his sentence is illegal  
14 because the district court did not have jurisdiction to  
15 impose a sentence for a sexual offense without a  
16 presentence investigation report. And because the  
17 district court did not have jurisdiction to impose the  
18 sentence, appellant argues that his due process rights  
19 were violated.

20 A motion to correct an illegal sentence may only  
21 challenge the facial legality of the sentence: either  
22 the district court was without jurisdiction to impose a  
23 sentence or the sentence was imposed in excess of the  
24 statutory maximum. *Edwards v. State*, 112 Nev. 704, 708,  
25 918 P.2d 321, 324 (1996). "A motion to correct an illegal  
26 sentence 'presupposes a valid conviction and may not,  
27 therefore, be used to challenge alleged errors in  
28 proceedings that occur prior to the imposition of  
sentence.'" *Id.* (quoting *Allen v. United States*, 495  
A.2d 1145, 1149 (D.C. 1985)). We conclude that the  
district court did not err in denying the motion because  
appellant failed to demonstrate that his sentence was  
facially illegal or that the district court lacked  
jurisdiction to impose a sentence.

29 While NRS 176.135(2) provides that a presentence  
30 investigation report "[m]ust be made before the  
31 imposition of sentence" for a defendant convicted of a  
32 sexual offense, nothing in this statute precludes the  
33 defendant from waiving the preparation of a presentence  
34 investigation report. See *Krauss v. State*, 116 Nev. 307,  
35 310, 998 P.2d 163, 165 (2000) ("Generally, a defendant  
36 is entitled to enter into agreements that waive or  
37 otherwise affect his or her fundamental rights."); *State*  
38 *v. Lewis*, 59 Nev. 262, 277, 91 P.2d 820, 825-26 (1939)  
("This court has often held that one charged with crime  
may waive a statutory requirement."). Here, appellant  
requested to waive the presentence investigation report,

1 and the district court personally canvassed appellant to  
2 ascertain that he entered the waiver knowingly and  
3 voluntarily. The district court accepted the waiver and  
4 sentenced appellant to life with parole eligibility  
5 after 25 years, the only sentence available for the crime  
6 in this case. See NRS 200.366(3)(b) (providing for a  
7 sentence of life with the possibility of parole after 25  
8 years for the crime of sexual assault on a child under  
9 the age of 16 years). At the most, imposition of a  
10 sentence without preparation of a presentence  
11 investigation report amounts to an error at sentencing,  
12 an error that does not implicate the district court's  
13 jurisdiction. See Nev. Const. art. 6, § 6(1); NRS  
14 171.010; *Thomas v. State*, 88 Nev. 382, 384, 498 P.2d  
15 1314, 1315-16 (1972) (recognizing the mandatory language  
16 in preparing a presentence investigation report, but  
17 holding that preparation of the report pursuant to NRS  
18 176.145 was not jurisdictional); see also *United States*  
19 *v. Cotton*, 535 U.S. 625, 630 (2002) ("[T]he term  
20 jurisdiction means . . . the courts' statutory or  
21 constitutional power to adjudicate the case.") (emphasis  
22 in original) (internal quotations marks omitted)). We  
23 further conclude that the district court did not err in  
24 concluding that appellant invited the error, and he  
25 cannot now complain. See *Rhyne v. State*, 118 Nev. 1, 9,  
26 38 P.3d 163, 168 (2002). And to the extent the  
27 presentence investigation report aids in parole  
28 consideration, classification, or other prison matters,  
the Division of Parole and Probation represented in  
earlier proceedings below that a postconviction report  
could be prepared as a substitute for a presentence  
investigation report. See Parole and Probation Division  
Directive Manual 6.3.124A ("[U]pon request of the Nevada  
Board of Parole Commissioners, the Division will conduct  
an investigation to provide the Parole Board with  
timely, relevant and accurate information concerning  
those felony-level case(s) where a Presentence  
Investigation Report was waived at the time of an  
offender/inmate sentencing."). Appellant's claim that  
his procedural due process rights were violated is  
without merit for the reasons discussed above.

(ECF No. 51-7).

The Nevada Supreme Court's rejection of Hermanson's due  
process claim was a reasonable application of clearly established  
federal law and was not based on an unreasonable application of  
the facts. Hermanson contends that he had a due process right to  
a PSI before being sentenced. (ECF No. 54 at 24-25). But even "the  
most basic rights of criminal defendants" are "subject to waiver."

1 *Peretz v. United States*, 501 U.S. 923, 936 (1991). A criminal  
2 defendant may waive his constitutional rights as long as there is  
3 clear and convincing evidence that the waiver was voluntary,  
4 knowing, and intelligent. *D.H. Overmyer Co., Inc. v. Frick Co.*,  
5 405 U.S. 174, 187 (1972).

6 Applying these well-established principles, the Nevada  
7 Supreme Court reasonably concluded that Hermanson knowingly and  
8 voluntarily waived his right to a PSI. As noted above, the court  
9 explained to Hermanson that he had a "right" to have a PSI prepared  
10 before sentencing. (ECF No. 14-8 at 14). Hermanson then confirmed  
11 that (i) he had discussed the PSI and "its role in [his]  
12 sentencing" with his counsel, (ii) he believed it was in his best  
13 interest to waive his right to a PSI and proceed to sentencing,  
14 and (iii) he did not need "further time to think about this." (*Id.*  
15 at 14-16). Thus, even assuming that Hermanson had a due process  
16 right to a PSI, a fairminded jurist could conclude that he  
17 knowingly and voluntarily waived that right, and that therefore  
18 his due process claim lacked merit. *Cf. United States v. Shehadeh*,  
19 962 F.3d 1096, 1102 n.4 (9th Cir. 2020) ("That even constitutional  
20 rights, such as the right to trial, are waivable further counsels  
21 in favor of our holding that defendant may waive preparation of a  
22 presentence report.").

23 Hermanson responds that his waiver was invalid because his  
24 counsel mistakenly stated during sentencing that he could "get the  
25 PSI when he's in prison." (ECF No. 14-8 at 7). As the Nevada  
26 Supreme Court explained, however, "the Division of Parole and  
27 Probation represented in earlier proceedings . . . that a  
28 postconviction report could be prepared as a substitute for a

1 presentence investigation report.” (ECF No. 51-7 at 3). Moreover,  
2 although Hermanson claims that a postconviction report may not  
3 “fully alleviate th[e] danger” that he “will never be able to go  
4 before the parole board due to the absence of the PSI,” he provides  
5 no evidence to support this assertion. (ECF No. 54 at 28-29). Thus,  
6 there is no basis to conclude that counsel’s allegedly mistaken  
7 statement about the possibility of “get[ting] the PSI” in prison  
8 rendered Hermanson’s waiver involuntary or unknowing. Hermanson is  
9 not entitled to relief on Ground 3.

10 **D. Grounds 2, 4, and 5**

11 This Court previously held that Grounds 2, 4, and 5 were  
12 technically exhausted but procedurally defaulted. (ECF No. 43 at  
13 7). The Court deferred ruling on whether Hermanson could excuse  
14 the default of those grounds until the merits disposition. (*Id.*)  
15 Hermanson now contends that he can show cause and prejudice to  
16 excuse the default of Grounds 2, 4, and 5 under *Martinez v. Ryan*,  
17 566 U.S. 1 (2012). (ECF No. 54 at 19-23, 30-33).

18 Where a petitioner “has defaulted his federal claims in state  
19 court pursuant to an independent and adequate state procedural  
20 rule,” federal habeas review “is barred unless the prisoner can  
21 demonstrate cause for the default and actual prejudice as a result  
22 of the alleged violation of federal law, or demonstrate that  
23 failure to consider the claims will result in a fundamental  
24 miscarriage of justice.” *Coleman v. Thompson*, 501 U.S. 722, 750  
25 (1991). To demonstrate cause, the petitioner must establish that  
26 some external and objective factor impeded efforts to comply with  
27 the state’s procedural rule. *E.g.*, *Murray v. Carrier*, 477 U.S.  
28 478, 488 (1986); *Hiivala v. Wood*, 195 F.3d. 1098, 1105 (9th Cir.



1 1999). "[T]o establish prejudice, [a petitioner] must show not  
2 merely a substantial federal claim, such that 'the errors . . . at  
3 trial created a possibility of prejudice,' but rather that the  
4 constitutional violation 'worked to his actual and substantial  
5 disadvantage.'" *Shinn v. Ramirez*, 142 S. Ct. 1718, 1733 (2022)  
6 (citing *Carrier*, 477 U.S. at 494, 106 S. Ct. 2639 and quoting  
7 *United States v. Frady*, 456 U.S. 152, 170 (1982) (emphasis in  
8 original)).

9 The Supreme Court has provided an alternative means to satisfy  
10 the cause requirement for purposes of overcoming a procedural  
11 default for an ineffective-assistance-of-trial-counsel claim where  
12 a petitioner can show that he received ineffective assistance of  
13 counsel in his initial state habeas proceeding. *Martinez*, 566 U.S.  
14 at 9. The Supreme Court outlined the necessary circumstances as  
15 follows:

16 [W]here (1) the claim of "ineffective assistance of  
17 trial counsel" was a "substantial" claim; (2) the  
18 "cause" consisted of there being "no counsel" or only  
19 "ineffective" counsel during the state collateral review  
20 proceeding; (3) the state collateral review proceeding  
21 was the "initial" review proceeding in respect to the  
22 "ineffective-assistance-of-trial-counsel claim"; and  
23 (4) state law requires that an "ineffective assistance  
24 of trial counsel [claim] . . . be raised in an initial-  
25 review collateral proceeding."

26 *Trevino v. Thaler*, 569 U.S. 413, 423 (2013) (quoting *Martinez*, 566  
27 U.S. at 14, 18).

28 A procedural default will not be excused if the underlying  
ineffective-assistance claim "is insubstantial," i.e., lacks merit  
or is "wholly without factual support." *Martinez*, 566 U.S. at 14-  
16 (citing *Miller-El v. Cockrell*, 537 U.S. 322 (2003)). In  
*Martinez*, the Supreme Court cited the standard for issuing a

1 certificate of appealability as analogous support for whether a  
2 claim is substantial. 566 U.S. at 14. A claim is substantial if a  
3 petitioner shows "reasonable jurists could debate whether . . .  
4 the [issue] should have been resolved in a different manner or  
5 that the issues presented were 'adequate to deserve encouragement  
6 to proceed further.'" *Miller-El*, 537 U.S. at 336.

7 For the reasons explained below, the Court concludes that  
8 *Martinez* does not excuse the default of Grounds 2, 4, and 5 because  
9 Hermanson's underlying ineffective-assistance claims are not  
10 "substantial."

### 11 1. Ground 2

12 In Ground 2, Hermanson alleges that his counsel provided  
13 ineffective assistance by "inducing [him] to plead guilty on the  
14 promise he could be sentenced without a PSI." (ECF No. 54 at 19).  
15 According to Hermanson, this promise was "illegal" because the  
16 court could not sentence him "without a PSI first being prepared."  
17 (*Id.* at 20). Hermanson contends that he chose to plead guilty in  
18 part because he was receiving inadequate treatment for his mental  
19 health issues at the Lyon County Jail, and his counsel told him  
20 that sentencing would be "expedite[d]"—and he would be sent to  
21 prisoner sooner—if he waived preparation of a PSI. (*Id.* at 21–22).  
22 Thus, Hermanson argues, if his counsel "had not made this promise,"  
23 he "would not have accepted the deal and would have proceeded to  
24 trial." (*Id.* at 21).

25 Ground 2 does not raise a "substantial" ineffective-  
26 assistance claim because Hermanson has failed to establish that  
27 his counsel performed deficiently. *Martinez*, 566 U.S. at 14. To  
28 demonstrate deficient performance, a petitioner "must show that

1 counsel's representation fell below an objective standard of  
2 reasonableness." *Strickland*, 466 U.S. at 688. The question is  
3 whether, under "prevailing professional norms," counsel's  
4 "assistance was reasonable considering all the circumstances." *Id.*  
5 There is "a strong presumption that counsel's conduct falls within  
6 the wide range of reasonable professional assistance," and in  
7 assessing counsel's performance, courts must make every effort "to  
8 eliminate the distorting effects of hindsight." *Id.* at 689.

9 Here, Hermanson's counsel allegedly advised him that he could  
10 be sentenced without a PSI. Hermanson was, indeed, sentenced  
11 without a PSI after he knowingly and voluntarily waived his right  
12 to have that document prepared before sentencing. (ECF No. 14-8 at  
13 14-17). Contrary to Hermanson's assertion, counsel's "promise"  
14 that he could be sentenced without a PSI was not "illegal." The  
15 alleged illegality of this promise rests on Hermanson's contention  
16 that the court "simply did not have the authority" to sentence him  
17 without a PSI. (ECF No. 54 at 20). That contention is incorrect.  
18 As noted above, the Nevada Supreme Court ruled that "nothing in  
19 th[e] [relevant] statute precludes [a] defendant [such as  
20 Hermanson] from waiving the preparation of a presentence  
21 investigation report." (ECF No. 51-7 at 2). Because counsel's  
22 advice was a correct statement of Nevada law, Hermanson cannot  
23 demonstrate deficient performance. Thus, Ground 2 does not raise  
24 a "substantial" ineffective-assistance claim, and Hermanson cannot  
25 rely on *Martinez* to overcome the default of this claim.

## 26 2. Ground 4

27 In Ground 4, Hermanson alleges that his counsel provided  
28 ineffective assistance because he had a conflict of interest. (ECF

1 No. 54 at 30). In 2002, Hermanson's counsel represented M.M.'s  
2 biological father in an abuse-or-neglect case under NRS Chapter  
3 432B. (ECF No. 15-1 at 88, 185-86). Specifically, Child Protective  
4 Services took M.M. away from her father and "awarded her to the  
5 State." (*Id.* at 88). Hermanson's counsel subsequently represented  
6 M.M.'s father as a "public defender" in the abuse-or-neglect case.  
7 (*Id.*) At the state postconviction evidentiary hearing, Hermanson's  
8 counsel testified that he believed M.M.'s father "worked the case  
9 plan" and that the case was ultimately "closed." (*Id.* at 186). The  
10 record does not include any additional information about the case.

11 Hermanson contends that, in representing M.M.'s father in the  
12 abuse-or-neglect case, counsel "invariably argued that the child  
13 would be safe in the father's custody." (ECF No. 54 at 30). Thus,  
14 according to Hermanson, counsel "had to consider" M.M.'s welfare  
15 during his representation of her father. (*Id.*) That allegedly  
16 "conflict[ed] with [counsel's] obligations in this case where he  
17 was representing a defendant who had been accused of harming that  
18 same child." (*Id.*)

19 Ground 4 fails to raise a "substantial" ineffective-  
20 assistance claim because there is no basis to conclude that the  
21 alleged conflict adversely affected counsel's performance.  
22 *Martinez*, 566 U.S. at 14. The right to counsel includes the right  
23 to assistance by a conflict-free attorney. *Wood v. Georgia*, 450  
24 U.S. 261, 271 (1981) (citing *Cuyler v. Sullivan*, 446 U.S. 335  
25 (1980) and *Holloway v. Arkansas*, 435 U.S. 475, 481 (1978)). "[T]he  
26 possibility of conflict is insufficient to impugn a criminal  
27 conviction. In order to demonstrate a violation of his Sixth  
28 Amendment rights, a defendant must establish that an actual

1 conflict of interest adversely affected his lawyer's performance."  
2 *Cuyler*, 446 U.S. at 350. An "actual conflict" is "a conflict that  
3 affected counsel's performance—as opposed to a mere theoretical  
4 division of loyalties." *Mickens v. Taylor*, 535 U.S. 162, 175  
5 (2002).

6 To establish an "adverse effect," a defendant must prove "that  
7 some plausible alternative defense strategy or tactic might have  
8 been pursued but was not and that the alternative defense was  
9 inherently in conflict with or not undertaken due to the attorney's  
10 other loyalties or interests." *United States v. Wells*, 394 F.3d  
11 725, 733 (9th Cir. 2005). In other words, "[t]o establish that a  
12 conflict of interest adversely affected counsel's performance, the  
13 defendant need only show that some effect on counsel's handling of  
14 particular aspects of the [case] was 'likely.'" *United States v.*  
15 *Miskinis*, 966 F.2d 1263, 1268 (9th Cir. 1992). Thus, "[w]hen faced  
16 with a defendant's claim that her counsel operated under an actual  
17 conflict, [t]he central question that we consider in assessing a  
18 conflict's adverse effect is what the advocate [found] himself  
19 compelled to refrain from doing because of the conflict." *United*  
20 *States v. Walter-Eze*, 869 F.3d 891, 901 (9th Cir. 2017) (internal  
21 quotation marks and citation omitted).

22 Hermanson fails to establish that the alleged conflict  
23 "significantly affected counsel's performance." *Mickens*, 535 U.S.  
24 at 172-73. Hermanson points to two "errors by counsel" that  
25 allegedly stemmed from the conflict of interest: counsel's  
26 "illegal" promise that Hermanson could be sentenced without a PSI,  
27 and his failure to investigate the case. (ECF No. 54 at 30). As to  
28 the first alleged error, Hermanson's counsel correctly advised him

1 that he could be sentenced without a PSI. Because counsel provided  
2 an accurate statement of Nevada law, the Court cannot conclude  
3 that the alleged conflict "adversely affected" his performance in  
4 this respect. *Cuyler*, 446 U.S. at 350.

5 As to the second alleged error, Hermanson has failed to  
6 establish that counsel's handling of the investigation was  
7 "likely" attributable to the conflict. *Miskinis*, 966 F.2d at 1268.  
8 At the state postconviction evidentiary hearing, Hermanson's  
9 counsel explained that he had spoken to several potential  
10 witnesses, but that the information they provided was not "very  
11 helpful in this case." (ECF No. 15-1 at 182-84). For example,  
12 counsel acknowledged receiving a written statement from Raymond  
13 McClory stating that he "didn't see Mr. Hermanson ever do anything  
14 with the kids" and "didn't believe they were ever left alone with  
15 him." (*Id.* at 171). Counsel explained, however, that "everybody  
16 else"—including Jody Martin—said that "at times" Hermanson was  
17 "left alone" with the victims. (*Id.*)

18 Counsel also acknowledged that Cecilia Gilland had mentioned  
19 her conversation with K.H., in which the victim allegedly said  
20 that Hermanson "had never hurt her, and that he never could." (*Id.*  
21 at 60-61, 183-84). According to counsel, however, by the time he  
22 received this information, Hermanson had already told him he wanted  
23 to plead guilty. (*Id.* at 184). That decision was prompted in large  
24 part by Hermanson's desire to avoid a sentence of life without the  
25 possibility of parole—a substantial risk given that Hermanson had  
26 admitted to law enforcement that he had touched M.M.'s genitalia.  
27 (*Id.* at 125-27, 184). In these circumstances, there is no basis to  
28 conclude that "some plausible alternative defense strategy or

1 tactic might have been pursued but was not and that the alternative  
2 defense was inherently in conflict with or not undertaken due to  
3 [counsel's] other loyalties or interests." *Wells*, 394 F.3d at 733.  
4 Accordingly, Hermanson's ineffective-assistance claim is not  
5 "substantial," and *Martinez* does not excuse the default of Ground  
6 4.

### 7                   **3. Ground 5**

8           In Ground 5, Hermanson alleges that his counsel rendered  
9 ineffective assistance by (i) mistakenly informing him that,  
10 because he pled guilty, "he was not entitled to bring an appeal";  
11 and (ii) failing to file a notice of appeal to "preserve [his]  
12 right to appeal." (ECF No. 54 at 32-33). Hermanson contends that  
13 his counsel's advice was incorrect because, under Nevada law, a  
14 guilty plea "does not foreclose an appeal," but instead limits the  
15 issues that can be raised on appeal to "constitutional,  
16 jurisdictional, or other grounds challenging the legality of the  
17 proceedings." (*Id.* at 32 (citing NRS § 177.015(4))). According to  
18 Hermanson, but for his counsel's mistaken advice, he would have  
19 brought a direct appeal challenging "the court's legal authority  
20 to impose a sentence without a" PSI. (*Id.*)

21           Ground 5 fails to raise a "substantial" ineffective-  
22 assistance claim. *Martinez*, 566 U.S. at 14. The *Strickland* "test  
23 applies to claims . . . that counsel was constitutionally  
24 ineffective for failing to file a notice of appeal." *Roe v. Flores-*  
25 *Ortega*, 528 U.S. 470, 477 (2000). To establish deficient  
26 performance under *Flores-Ortega*, a petitioner must make one of the  
27 following showings: (i) that counsel "fail[ed] to follow the  
28 defendant's express instructions with respect to an appeal"; (ii)

1 that "a rational defendant would want to appeal (for example,  
2 because there are nonfrivolous grounds for appeal)" and counsel  
3 did not consult with the defendant about appealing; or (iii) that  
4 the defendant "reasonably demonstrated to counsel that he was  
5 interested in appealing" and counsel did not consult with the  
6 defendant. *Id.* at 478, 480. "Consult," in this context, "means  
7 advising the defendant about the advantages and disadvantages of  
8 taking an appeal and making a reasonable effort to discover the  
9 defendant's wishes." *Id.* at 471.

10 To show prejudice, the petitioner "must demonstrate that  
11 there is a reasonable probability that, but for counsel's deficient  
12 failure to consult with him about an appeal, he would have timely  
13 appealed." *Id.* at 484. "[E]vidence that there were nonfrivolous  
14 grounds for appeal or that the defendant in question promptly  
15 expressed a desire to appeal will often be highly relevant in  
16 making this determination." *Id.* at 485. Although "the performance  
17 and prejudice prongs may overlap, they are not in all cases  
18 coextensive." *Id.* at 486. Specifically, "[t]o prove deficient  
19 performance, a defendant can rely on evidence that he sufficiently  
20 demonstrated to counsel his interest in an appeal. But such  
21 evidence alone is insufficient to establish that, had the defendant  
22 received reasonable advice from counsel about the appeal, he would  
23 have instructed his counsel to file an appeal." *Id.*

24 Hermanson's ineffective-assistance claim is insubstantial  
25 because he fails to show that, but for his counsel's allegedly  
26 deficient conduct, he would have appealed.<sup>5</sup> First, as explained

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27  
28 <sup>5</sup> The Court assumes, without deciding, that Hermanson's counsel failed to  
"consult" with him about an appeal within the meaning of *Flores-Ortega*.



1 above, Hermanson pled guilty in large part to avoid the very real  
2 possibility of receiving a sentence of life without the possibility  
3 of parole. (ECF No. 15-1 at 184). The plea agreement gave Hermanson  
4 a substantial benefit—the prospect of getting out of prison during  
5 his lifetime. (ECF No. 14-9). Second, Hermanson fails to point to  
6 any nonfrivolous grounds for appeal. He claims that he would have  
7 argued on direct appeal that the court could not sentence him  
8 without a PSI. (ECF No. 54 at 32). But, as the Nevada Supreme Court  
9 later held, the law permitted the court to sentence Hermanson  
10 without a PSI given his waiver of that requirement, and Hermanson  
11 could not raise the issue on appeal in any event because he asked  
12 the court to forgo a PSI and proceed with sentencing. (ECF No. 51-  
13 7). In these circumstances, Hermanson has not established that,  
14 had he “received reasonable advice from counsel about the appeal,  
15 he would have instructed his counsel to file an appeal.” *Flores-*  
16 *Ortega*, 528 U.S. at 486.

17 Accordingly, because Hermanson has failed to satisfy the  
18 prejudice prong, his ineffective-assistance claim is not  
19 substantial, and *Martinez* does not excuse the default of Ground  
20 5.<sup>6</sup>

#### 21 **E. Certificate of Appealability**

22 This is a final order adverse to Hermanson. Rule 11 of the  
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24 <sup>6</sup> Hermanson requests that the Court conduct an evidentiary hearing. (ECF No. 21  
25 at 25). But he fails to explain what evidence would be presented at such a  
26 hearing. Furthermore, the Court has already determined that Hermanson is not  
27 entitled to relief, and neither further factual development nor any evidence  
28 that may be offered at an evidentiary hearing would affect this Court’s reasons  
for denying relief. See *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007) (“[I]f  
the record refutes the applicant’s factual allegations or otherwise precludes  
habeas relief, a district court is not required to hold an evidentiary  
hearing.”); see also 28 U.S.C. § 2254(e)(2). Thus, Hermanson’s request for an  
evidentiary hearing is denied.

Rules Governing Section 2254 Cases requires the Court to issue or deny a certificate of appealability. Therefore, the Court has *sua sponte* evaluated the claims in the second amended petition for suitability for the issuance of a certificate of appealability. See 28 U.S.C. § 2253(c); *Turner v. Calderon*, 281 F.3d 851, 864-65 (9th Cir. 2002). Pursuant to 28 U.S.C. § 2253(c)(2), a certificate of appealability may issue only when the petitioner "has made a substantial showing of the denial of a constitutional right." With respect to claims rejected on the merits, a petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citing *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4 (1983)). For procedural rulings, a certificate of appealability will issue only if reasonable jurists could debate (i) whether the petition states a valid claim of the denial of a constitutional right and (ii) whether this Court's procedural ruling was correct. *Id.*

Applying these standards, the Court finds that a certificate of appealability is unwarranted.

#### **IV. CONCLUSION**

IT THEREFORE IS ORDERED that Hermanson's second amended petition for a writ of habeas corpus under 28 U.S.C. § 2254 (ECF No. 21) is DENIED.

IT FURTHER IS ORDERED that Hermanson is DENIED a certificate of appealability.

IT FURTHER IS ORDERED that the Clerk of the Court shall substitute Fernandies Frazier for Respondent Isidro Baca.

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1 IT FURTHER IS ORDERED that the Clerk of the Court shall enter  
2 judgment accordingly and close this case.

3 DATED: this 12th day of December, 2022.

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HOWARD D. MCKIBBEN  
UNITED STATES DISTRICT JUDGE